(8)

No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS, *Appellant*,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER, AND W.J., NATURAL FATHER, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., KALISPEL TRIBE OF INDIANS OF THE KALISPEL RESERVATION, WASHINGTON, THE MESCALERO APACHE TRIBE OF THE MESCALERO APACHE RESERVATION, NEW MEXICO, PUEBLO OF SAN ILDEFONSO OF NEW MEXICO, PUEBLO OF SANTA ANA OF NEW MEXICO, PUEBLO OF SANTO DOMINGO OF NEW MEXICO, PUEBLO OF TESUQUE OF NEW MEXICO, SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA OF THE MESQUAKIE SETTLEMENT, IOWA, AND SISSETON-WAHPETON SIOUX TRIBE OF THE LAKE TRAVERSE INDIAN RESERVATION, NORTH DAKOTA AND SOUTH DAKOTA FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

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July 1988

**Attorney of Record*

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Pursuant to Rules 36(3) and 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 95 Madison Avenue, New York, New York 10016, the Kalispel Tribe of Indians of the Kalispel Reservation, Washington, the Mescalero Apache Tribe of the Mescalero Apache Reservation, New Mexico, the Pueblo of San Ildefonso of New Mexico, the Pueblo of Santa Ana of New Mexico, the Pueblo of Santo Domingo of New Mexico, the Pueblo of Tesuque of New Mexico, the Sac and Fox Tribe of the Mississippi in Iowa of the Mesquakie Settlement, Iowa, and the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation, North Dakota and South Dakota respectfully move the Court for leave to file the attached brief amici curiae in support of the appellant. The appellees refused consent to the filing of this brief.

The Association on American Indian Affairs, Inc. (AAIA) is a non-profit membership corporation organized under the laws of the State of New York for the purpose, inter alia, of protecting the rights of self-government exercised by Indian tribes. For many years, the Association has been the largest Indian-interest organization with a nationwide membership that consists of both Indians and non-Indians. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the drafting of the Act. The Association continues to work with tribes in

implementing the Act including the negotiation of tribal-state agreements, testimony before Congress and legal assistance in contested cases.

The other amici are federally recognized Indian tribes, each exercising jurisdiction over child custody proceedings involving tribal members who are resident or domiciled within their respective tribal communities.

Amici seek to file an amici curiae brief in this case because of the far-reaching impact the decision below is likely to have on the ability of Indian tribes to exercise exclusive jurisdiction over custody determinations involving children with respect to whom Indian tribes have a substantial parens patriae and societal interest. Amici also seek to file an amici curiae brief because the decision below seriously jeopardizes the best interests of Indian children,

interests that Indian tribes are most competent to protect.

The immediate parties to this suit have focused primarily upon the circumstances surrounding their particular dispute and are, of course, less concerned with the broader framework of the dispute and its potential consequences for every tribe. To apprise the Court of this impact and to place the dispute in proper context, including a full examination of the purposes of the Indian Child Welfare Act (ICWA) and the social circumstances and legal precedents that gave rise to the ICWA, the amici respectfully request that their motion for leave to file the attached brief amici curiae be granted.

Respectfully submitted,

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July 25, 1988

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INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. (AAIA) is a non-profit membership corporation organized under the laws of the State of New York for the purpose, inter alia, of protecting the rights of self-government exercised by Indian tribes. For many years, the Association has been the largest Indian-interest organization with a nationwide membership that consists of both Indians and non-Indians. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indain child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the

drafting of the Act. The Association continues to work with tribes in implementing the Act including the negotiation of tribal-state agreements, testimony before Congress and legal assistance in contested cases. The Association has filed amicus curiae briefs with this Court in major cases affecting Indian rights, including United States v. Dion, 476 U.S. 734 (1986), County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985), and National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

The other amici are all federally recognized Indian tribes. These amici, in their parens patriae capacity, exercise jurisdiction over child custody proceedings involving tribal members and have a substantial and compelling governmental and societal interest in

maintaining a meaningful relationship, whenever possible, with children who are tribal members or eligible for membership. Unfortunately, amici have learned from bitter experience that state jurisdiction over custody proceedings involving Indian children most frequently severs all connection between such children and their tribes, thereby placing tribal survival at grave risk, and, because these children are often placed in non-Indian homes little concerned with their Indian identity, these children are often crippled by devastating psychological dysfunction.

This case presents a question of great and continuing concern to the amici: whether Indian tribes have the exclusive authority to determine -- based upon a thorough and culturally-sensitive analysis of the children's best interest -- the custody and, in particular, the adoption

of Indian children whose parents reside and are domiciled on the reservation of the Indian child's tribe.

The importance of this question to longstanding principles of Indian self-determination cannot be overemphasized. If the Mississippi Supreme Court decision is allowed to stand, many Indian children will continue to be placed in inappropriate settings that will deprive them of a tribal relationship. Many of these children will be irreparably and adversely affected while the tribes will lose the opportunity to impart tribal culture, language, customs and beliefs to their next generation -- upon which the very existence of all tribes depends.

Amici submit the attached brief in support of the appellant to assist the Court in recognizing that the decision of the court below badly misconstrues the purpose and meaning of the Indian Child

Welfare Act and contravenes numerous decisions of this and other courts protecting tribal exclusive jurisdiction over domestic relations matters, including child custody. If uncorrected, the decision could have a devastating impact on tribal self-government and survival. The immediate parties to the case are likely not to consider the broader ramifications of the decision below nor to fully brief the historical, sociological and legal context which gave rise to the enactment of the Indian Child Welfare Act. Such a discussion by amici may be helpful to the Court in considering this case.

STATEMENT OF THE CASE

For purposes of this brief, amici curiae adopt the "Statement of the Case" found in Appellant's jurisdictional statement at pages 3-5.

SUMMARY OF ARGUMENT

Throughout the history of the United States, this Court and other courts have recognized the inherent sovereign power of Indian tribes over domestic relations matters involving tribal members who maintained tribal relations. In particular, the right of tribes to determine the custody of Indian children, as a necessary guarantor of tribal integrity and on-going self-government, has been repeatedly expressed in judicial decisions.

The Indian Child Welfare Act was designed, in part, to end State incursions upon this fundamental right of tribes and to address abusive State practices resulting in the foster care and adoptive placement of extraordinary numbers of Indian children in non-Indian homes. In passing the ICWA, Congress intended to (1) strengthen tribes, and (2) protect the

best interests of Indian children by (a) ensuring tribal involvement in and, in most cases, control over decisions involving their children and (b) maximizing the opportunity for Indian children to maintain contacts with their tribes and extended families. An integral part of the statutory scheme was the codification of the rule, established by case law, that Indian tribes have exclusive jurisdiction over child custody proceedings involving Indian children residing or domiciled in the tribal community.

The Mississippi Supreme Court decision below contravenes both the basic jurisdictional principles historically expressed in case law, as well as the jurisdictional mandate of the Indian Child Welfare Act. It establishes a basis for the exercise of state jurisdiction based upon a novel theory of domicile, that, if

sustained, would deprive tribes of the ability to ensure the well-being of the children of the tribal community and would threaten Indian tribes with the unwarranted loss of untold numbers of children, a "resource...more vital to the continued existence and integrity of Indian tribes" than any other. 25 U.S.C. 1901(3). As a matter of federal law, the domicile of an Indian child should remain that of his or her reservation-domiciled parents until entry of a tribal court order that unambiguously results in changing the child's reservation domicile.

ARGUMENT

I. THE MISSISSIPPI BAND OF CHOCTAW INDIANS HAS EXCLUSIVE JURISDICTION TO DETERMINE THE CUSTODY OF THE CHILDREN INVOLVED IN THIS CASE.

A. Exclusive tribal jurisdiction over domestic relations, including the placement and adoption of children, has been recognized as a core component of Indian sovereignty.

Tribal exercise of jurisdiction over the domestic relations of tribal members who maintain tribal relations has been repeatedly recognized in a long series of cases dating from the 1800s to the present. In United States v. Quiver, 241 U.S. 602 (1916), this Court acknowledged that "personal and domestic relations of the Indians" have been regulated from "an early period... according to their tribal customs and laws." 241 U.S. at 603-604.

Federal and state courts had long recognized the jurisdiction and authority

of tribes over domestic relations matters. See, e.g., Yakima Joe v. To-is-lap, 191 F. 516, 517-518 (D. Oregon 1910) (upholding validity of a tribal marriage, on the grounds that "it is the policy of the law to treat Indians who retain their tribal relations...as separate and independent communities, with full and free authority to regulate and manage their own domestic affairs....[T]he Indians...[have] the power of regulating their internal and social relations, and....[are] not brought under the laws of the state."); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897) (Cherokee Nation has exclusive jurisdiction over the divorce of a tribal member and a non-Indian who resided on the Cherokee reservation); Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N.W. 602, 605-606 (1889) (recognizing a polygamous marriage on the grounds that tribes have "full jurisdiction...over personal

relations" and that the State "cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them."); Davison v. Gibson, 56 F. 443, 445 (8th Cir. 1893) (holding that the rights of the parties, citizens and residents of the Creek Nation must be determined by the custom or law of the Creek Nation and that "domestic relations of the Indians...have never been regulated by the common law of England"); Earl v. Godley, 42 Minn. 361, 44 N.W. 254 (1890) (children of marriage recognized by Indian custom are legitimate); McBean v. McBean, 37 Or. 195, 61 P. 418, 420 (1900) (although finding that there was no proof that the couple had been married in accordance with tribal custom, the court acknowledged that "it is the adjudged policy of the law to treat the Indian tribes...as separate communities .... with full and free authority to manage

their own domestic affairs....Nor are they regarded as subject to the state laws.").

Even where the child was temporarily living off reservation, some early cases rejected State court jurisdiction over reservation Indians, implicitly recognizing that the child's domicile is determinative of jurisdiction. In re Lelah-puc-ka-chee, 98 F. 429 (N.D. Iowa 1899) and Peters v. Malin, 111 F. 244 (N.D. Iowa 1901), for example, held that the State court had no power to appoint a school administrator as guardian for an Indian girl, attending an off-reservation technical school, whose parents resided on the reservation. Such an appointment was of no legal force because the State had no "control over the domestic affairs or relations of these Indians, including the education of the children...[and] the control of the parents or relations over them...." Peters v. Malin, supra, 111 F.

at 253.

This doctrine which eschewed state jurisdiction over tribal Indians recognized that tribes had formal and informal mechanisms for resolving domestic issues within their tribal communities, including, as illustrated by In re Lelah-puc-ka-chee, supra, and Peters v. Malin, supra, issues relating to the care and custody of children. The Mississippi Band of Choctaw Indians, appellants in this case, were typical in this regard.

The Choctaw had a tradition of collectively taking care of all of the children of the tribe. A noted 19th century historian observed:

> The custom of adopting relatives or orphan children is very common. Even married people who have children, occasionally adopt one or more. They take an equal part with the other heirs and are sometimes even allotted the best share.

Claiborne, J. F.H., Mississippi as a Province, Territory and State (1964

reprint) at 523 (hereinafter "Claiborne").[1] There were "no orphan children unprovided for in their country." Cushman, H. B., History of the Choctaw, Chickasaw and Natchez Indians (1962 reprint) (hereinafter "Cushman") at 191.

> Never have there been found among the...Choctaws homeless and friendless orphan children thrown out to shift for themselves and left 'to root pig or die'. I have seen time and time again, in many families among the...Choctaws from one to four adopted orphan children....And one might live in a family of adopted orphans, and, unless told, he would not even suspect but that all the children were of the same parentage.

Id. at 400-401.

In fact, when the majority of Choctaw were forced to migrate to Oklahoma in the early 1830s, one of the first acts by the newly constituted Oklahoma Choctaw legislature in 1836 was "An act for the

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[1] This same historian observed that the Choctaw were "[v]ery tender towards their children, treating them generally with greater kindness than is customary with other people." Claiborne, supra, at 494.

appointment of guardians for Choctaw minors residing out of this Nation and who wish to remove and reside therein". Choctaw Nation, The Constitution and Laws of the Choctaw Nation, 1838 (1840).

Thus, the Choctaw have long handled their own child welfare matters in accordance with their law and custom, an exercise of authority recognized by early case law.[2] This authority has been repeatedly affirmed by contemporary courts.

In the oft-cited 1934 opinion, "Powers of Indian Tribes", the Interior Department solicitor stated that "[t]he Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members." 55

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[2] Choctaw Nation jurisdiction over all civil matters was recognized by the United States government. See 7 Op. Atty.Gen. 175, 179-181 (1855), quoted in National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854-855 (1985).

I.D. 14, 40 (1934). Consistent with this sovereign right, State courts have upheld exclusive tribal jurisdiction when domestic relations are involved. See, e.g., Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950) (divorce); Whyte v. District Court of Montezuma County, 140 Colo. 334, 346 P.2d 1012 (1959), cert. den., 363 U.S. 829 (1960) (divorce); State ex rel. Adams v. Superior Court, 57 Wash.2d 181, 356 P.2d 985 (1960) (child custody matter involving family domiciled on allotted land); In re Colwash, 57 Wash.2d 196, 356 P.2d 994 (1960) (dependency proceeding where child resident of reservation); In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) (termination of parental rights of parents residing on the reservation).

A series of cases, in the years immediately preceding the enactment of the Indian Child Welfare Act, sustained

this principle and are of particular relevance to this case.

In Fisher v. District Court, 424 U.S. 382 (1976), this Court rejected state court jurisdiction over an adoption of an Indian child where the parties were members of the tribe and resided on the reservation. The Court held that

> State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves.

424 U.S. at 387-388. The Court found that the facts that the child had been born off of the reservation and that the parents had been married and divorced off the reservation were of "marginal relevance" in view of the "residence of the litigants". Id. at 390 n. 14. This Court has recognized the primacy of tribal jurisdiction over domestic relations in

many cases. See, e.g., United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978) ("unless limited by treaty or statute, a tribe has the power...to regulate domestic relations among tribe members.").

In addition, a number of lower federal and state courts upheld exclusive tribal jurisdiction to determine the custody of Indian children who resided off of the reservation but who were domiciled on the reservation. Wisconsin Potowatomies, etc. v. Houston, 393 F.Supp. 719 (W.D. Mich. 1973), involved the custody of children of an Indian father and non-Indian mother, both deceased. The children had been living off-reservation with their mother and a relative for about two months prior to the death of the parents. Before that time, the children had lived on the reservation with their parents for about a year and a half. Both children had been born off

reservation and lived, for a period of time, off the reservation. The court determined that the domicile of the children followed the parents and, rejecting the notion that physical presence is necessary to establish domicile, held that at the time of their death, the parents had been domiciled on the reservation -- thus vesting the tribe with the exclusive jurisdiction to determine the custody of the children. Id. at 731-732. The court stated:

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity.

Id. at 730.

In Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975), non-Indians who had been appointed the guardians of an Indian child in a tribal court proceeding sought permanent custody of the child in a

state court proceeding. Even though the child was residing in Maryland, the state Court of Appeals upheld the exclusive jurisdiction of the tribe based upon the reservation domicile of the child. The court found that (1) child-rearing is an "essential tribal relation", (2) it is "well settled" that the domicile of a minor is that of the parent, and (3) by changing their domicile, tribally-appointed guardians cannot shift the domicile of the child. 347 A.2d at 234, 238. See also Matter of Adoption of Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976) (notwithstanding that the child had been placed by the tribal court in foster care off of the reservation, the Blackfeet tribe and not the State court has jurisdiction over the adoption of a child whose mother is domiciled on the reservation).

Thus, court after court had recognized the broad scope of exclusive tribal jurisdiction over domestic relations in general and child custody matters specifically, even in many circumstances where the child was not physically located on the reservation. Notwithstanding these precedents, however, Congressional hearings in the 1970s revealed that many Indian children were wrongfully removed from their families and tribes by State authorities usurping tribal jurisdictional prerogatives. Accordingly, in 1978, Congress enacted the Indian Child Welfare Act, in significant part, to codify and expand tribal jurisdiction over Indian child custody determinations. See part B., infra.

B. The Indian Child Welfare Act, which codified and expanded upon previous jurisdictional case law, is a remedial act which recognizes the central role of Indian tribes in determining the best interests of Indian children, including the right to exclusive jurisdiction over children domiciled on the reservation.

The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. 1901 et seq., was passed as a response to widespread evidence that abusive child welfare practices had caused thousands of Indian children to be wrongfully separated from their families, usually to be placed in non-Indian households or institutions. The report on ICWA of the House Interior and Insular Affairs Committee concluded that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H. Rep. No. 1386, 95th Cong., 2d Sess. (July 24, 1978) at 9 (hereinafter "House Report"). It cited Association on American Indian

Affairs' (AAIA) studies, commissioned by Congress, which revealed that 25-35% of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions. Id.

The AAIA studies reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed, with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times the non-Indian rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "1977 Senate Hearing"). Likewise, all but one of the states surveyed had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption

rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian adoption rate. Id. The AAIA study also found that most of the Indian children placed outside of their homes were placed with non-Indian families. The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York; the percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

The House Report concluded that these placement rates were a result of several factors:

> (1) ...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law....Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.
>
> (3) ...agencies established to place children have an incentive to find children to place.
>
> (4) ...effects of our national paternalism...alienate some Indian parents from their society....

House Report, supra, at 10-12

Congress recognized that these statistics also reflected the fact that "[g]enerally, there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agencies." Statement of Congressman Robert Lagomarsino, minority co-sponsor of the Indian Child Welfare Act, 124 Cong. Rec. H 12849 (Oct. 14, 1978).

In addition, Congress found that improper state court actions played an important role in creating this situation. The statutory findings explicitly note that State "judicial bodies...have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). Likewise, the legislative history is filled with criticism of state court proceedings involving the placement of Indian children in foster and adoptive homes. Congressman Morris Udall, sponsor of the Indian Child Welfare Act, in a letter to Assistant Attorney General Patricia Wald reprinted as part of the legislative history of the ICWA, asserted that "state courts and agencies and their procedures share a large part of the responsibility for this crisis." 124 Cong. Rec. H 12850 (Oct. 14, 1978). See also

House Report, supra, at 11 ("The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life.").

Congress found that the extraordinary and unwarranted rate of placement -- resulting from historical state disregard for tribal integrity and culture and the frequent exclusion of tribes from child custody decision-making was not in the best interests of Indian tribes, families and children. See 25 U.S.C. 1901, 1902.

In the case of tribes, Congress explicitly found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...." 25 U.S.C. 1901(3). Congressman Udall expanded upon this finding both in his statement accompanying the introduction of the Indian Child Welfare Act and in the floor debate prior to passage:

> We could not more effectively and completely destroy an Indian tribe than by depriving them of their children.

124 Cong. Rec. H 3560 (May 3, 1978).

> Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.

124 Cong. Rec. H 12849 (Oct. 14, 1978).

Courts have underscored the importance of this Congressional finding. In Matter of M.E.M., 635 P.2d 1313, 1316 (Mont. 1981), the Montana Supreme Court stated:

> The Indian Child Welfare Act of 1978 was passed by Congress in response to a significant threat to the integrity of Indian cultures in this country. The Act represents Congressional recognition of the concomitant cultural interests of Indian tribes and Indian children; interests fundamental to the perpetuation and preservation of their mutual and valuable heritage....Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily

> relegated, at best, to anthropological examination and categorization.

See also Matter of Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 635 P.2d 187, 188-189 (Ariz. App. 1981), cert. den. sub. nom. Catholic Social Services of Tucson v. P.C., 455 U.S. 1007 (1982).

Congress also determined that the best interests of Indian children are served by maintaining them in an Indian environment whenever possible, preferably within the tribal community and within their extended families. See Matter of Appeal in Pima County, supra, 635 P.2d at 189 ("The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.").

Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and

later suffering from debilitating identity crises when they reached adolescence. This phenomenon occurred even when the children had few memories of living as part of an Indian community. As the Senate Select Committee on Indian Affairs noted in its report on the ICWA: "Removal of Indians from Indian society has serious long-and short-term effects...for the individual child ... who may suffer untold social and psychological consequences." S. Rep. 597, 95th Cong. 1st Sess. (Nov. 3, 1977) at 43. (hereinafter "Senate Report"). For example, in testimony submitted to the Senate Select Committee on Indian Affairs by the American Academy of Child Psychiatry, it was stated that:

> There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly

> in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment with its attendant multiple ramifications.

1977 Senate Hearing, supra, at 114.

At an earlier hearing, Dr. Joseph Westermeyer of the Department of Psychiatry at the University of Minnesota testified similarly concerning patients that he had treated:

> ...[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group. Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children....The other experience was

> derogatory name calling in relation to their racial identity....[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.

"Indian Child Welfare Program", Hearings on problems that American Indian families face in raising their children and how these problems are affected by Federal action or inaction before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, 93rd Cong., 2d Sess. (April 8-9, 1974) at 46 (hereinafter "1974 Senate Hearing"). See also findings of Congress' American Indian Policy Review Commission reprinted in the Senate Report, supra, at 52 ("Removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many individual Indian children"); Comments of Senator James Abourezk, 1977 Senate Hearings, supra, at 2 ("Officials

seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered....This course can only weaken rather than strengthen the Indian child...."); Testimony of Louis La Rose, chairman of the Winnebago Tribe, Senate Report, supra, at 43; Colloquy between Senator James Abourezk and Bertram E. Hirsch of the Association on American Indian Affairs, 1977 Senate Hearings, supra, at 77-78.

An emphasis on maintaining the child's connection with his or her specific tribe is also evident in the legislative history of ICWA. See, e.g., Statement by Congressman Lagomarsino, 124 Cong. Rec. H12849 (Oct. 14, 1978) ("[S]eparation of an Indian child from his family leads to the loss of his right to share in the cultural and property

benefits of membership in his tribe."); Testimony of Dr. James Shore, 1974 Senate Hearings, supra, at 101-114. See also 25 U.S.C. 1917 (providing a means by which Indian children adopted under State law can reestablish their tribal relationship).

There was also substantial testimony regarding the importance to Indian children of the extended family relationship. As the House Report explained:

> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family.

House Report, supra, at 10.

> The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

House Report, supra, at 20. Senator

Abourezk, principal sponsor of the Indian Child Welfare Act in the Senate, addressed the same cultural tradition in the Senate hearing which led to the introduction of the Act:

> We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or friend will take that child in. It's the extended family concept.[3]

1974 Senate Hearing, supra, at 473. See

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[3] This family organization system was also a defining characteristic of traditional Choctaw society. The responsibility for raising a Choctaw child was shared by many of the child's relatives. In fact, under Choctaw custom the mother's male relatives had custodial rights and responsibilities in regard to that child superior to that of the father. Claiborne, supra, at 517. A child's maternal uncle, or if he were dead, another male relative, and not the father, would be consulted in all that concerned the child. Id; Cushman, supra, at 87. The Reverend Israel Folsom, a Choctaw, described it thus: "In the domestic government the oldest brother or uncle was the head; the parents being required merely to assist in the exercise of this duty by their advice and example." Cushman, supra, at 300. See also Swanton, John R., Source Material for the Social

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also, e. g., Testimony of Faye La Pointe for the Puyallup Tribe in "Indian Child Welfare Act of 1978", Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands, House Committee on Interior and Insular Affairs, 95th Cong., 2nd Sess. (February 9 and March 9, 1978)

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3 -continued-
and Ceremonial Life of the Choctaw Indians, Smithsonian Bulletin No. 103 (1931) at 77 (quoting from diary of Alfred Wright, missionary, who stated that the "[w]oman's brothers are considered the natural guardians of the child"). If the mother and father separated, custom dictated that the child would be adopted by the maternal grandfather. Claiborne, supra, at 521.

The Choctaw language, still widely spoken, also reflects the importance of extended family relationships in Choctaw culture. The words for mother and father are extended to the father's sisters and mother's brother respectively, as well as to sons of paternal great uncles, grandsons of paternal great-great uncles, uncles by marriage on the mother's side, daughters of maternal great aunts, granddaughters of maternal great-great aunts and a number of other relatives as well. Swanton, supra, at 87. The words for brother and sister are likewise extended to the children of the child's paternal uncle or maternal aunt and a variety of other cousins as well. Id. at 88.

at 204 ("The extended family still exists in Indian country, it means living together, loving together, crying together, sharing all things and never having to worry about being alone."); Testimony of Dr. Robert Bergman, Chief, Mental Health Program, Indian Health Service, 1974 Senate Hearing, supra, at 130.[4]

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4 Courts have also recognized the strength and importance of the Indian extended family. See, e.g., Arizona State Dept. of Public Welfare v. HEW, 449 F.2d 456, 477 (9th Cir. 1971), cert den., 405 U.S. 919 (1972) (in the context of evaluating a public assistance plan, the court noted that "the evidence showed...a common, if not the predominant cultural pattern among ...Indians in Arizona is the 'extended family'. Under this cultural system, it is common for children to be sent to live for short periods of time with relatives."); Wisconsin Potowatomies, etc. v. Houston, supra, 393 F. Supp. at 726, 733-734 (noting testimony that had been presented concerning the kinship community and role of grandparents and great-uncles in raising children and finding that the great-uncle had attempted, pursuant to tribal custom, to obtain custody of the children in question). Cf. Moore v. City of East Cleveland, 431 U.S. 494, 508 -continued-

For all of the foregoing reasons, Congress established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...." 25 U.S.C. 1902. These standards are designed "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families...." Id. In enacting these standards, Congress acted pursuant to its trust responsibility to protect Indian children and preserve Indian tribes. 25 U.S.C. 1901(2),(3).

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4 -continued-
(1977) (Brennan, J., conc.) ("[T]he 'nuclear family' is the pattern so often found in much of white suburbia....The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The 'extended family'...remains ...a prominent pattern...for large numbers of the poor and deprived minorities of our society.").

Thus, under the Act, extended family members are the most preferred foster care and adoptive placement, followed by placements which maintain the child's relationship with the tribe. 25 U.S.C. 1915(a),(b). ICWA defines extended family with deference to tribal law and custom. 25 U.S.C. 1903(2).

In addition, and most significantly for the purposes of this case, the ICWA emphasizes tribal involvement in and, wherever possible, control of decisions involving the welfare of Indian children. Thus, inter alia, tribes have exclusive jurisdiction over a child custody proceeding where a child is resident or domiciled on the reservation, 25 U.S.C. 1911(a), concurrent (indeed presumptive) jurisdiction over such proceedings if the child is resident and domiciled off reservation, 25 U.S.C. 1911(b), must receive notice of all involuntary

proceedings in state court, 25 U.S.C. 1912(a), may intervene in voluntary and involuntary proceedings in State court, 25 U.S.C. 1911(c), and may establish foster care or adoptive placement preferences which supersede otherwise applicable ICWA preferences, 25 U.S.C. 1915(c). Even when a State court or agency legitimately exercises authority to place an Indian child, it must apply "the social and cultural standards of the Indian community in which the parents and extended family resides or...maintain social and cultural ties." 25 U.S.C. 1915(d). As Senator Abourezk explained, "the Indian community itself...know(s) much better what is in their best interest than we do..." 1974 Senate Hearing, supra, at 473.

This tribal involvement and control ensures that decisions about the custody of Indian children will consider all of the diverse and unique factors which should be

part of any determination of an Indian child's best interest. In addition, it ensures that the child's ties with his tribe and extended family will be preserved unless there are compelling reasons to sever those ties. At its core, this was the purpose of ICWA.

The Mississippi Supreme Court decision is a blatant intrusion into the protected realm of tribal decision-making in regard to the adoption of Indian children -- decision-making powers that are essential for the tribe's continuing existence. The decision reflects the continuing State "fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families". 25 U.S.C. 1901(5). For these reasons, as fully more explained in part C, infra, this court should reverse the decision of the Mississippi Supreme Court.

C. The intent and purpose of the **Indian Child Welfare Act, as well as the underlying principles of Indian sovereignty over domestic relations matters expounded in preexisting case law, can be fulfilled only if the Mississippi Band of Choctaw Indians has exclusive jurisdiction over the adoption of B.B. and G.B.**

The question presented in this case is whether a child born off reservation to parents who are resident and domiciled on the reservation is subject to the exclusive jurisdiction of the tribal court. 25 U.S.C. 1911(a) provides that "an Indian tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe ...." "Child custody proceeding" is defined in 25 U.S.C. 1903(1) (ii) and (iv), respectively, to include "any action resulting in the termination of the parent-child relationship" and "the permanent placement

of an Indian child for adoption, including any action resulting in a final decree of adoption." Thus, if B.B. and G.B. are domiciled on the reservation, federal law is unambiguous; the state of Mississippi had no jurisdiction to decree their adoption.

The court below developed a new and unique definition of domicile, requiring the physical presence of a child as a prerequisite to a finding of reservation domicile. Matter of B.B., 511 So.2d 918, 921 (Miss. Sup. Ct. 1987), prob. juris. post. sub. nom. Mississippi Band of Choctaw Indians v. Holyfield, __ U.S.__, 108 S.Ct.1993 (1988). This interpretation contradicts the generally followed rule, viz., "At birth, an illegitimate child acquires the domicile of his or her mother." See Restatement (Second) of Conflict of Laws, sec. 22, comment c (1971). Indeed, the lower court decision

ignored preexisting Mississippi precedent holding that a minor's domicile is that of his parents. See, e.g., In re Guardianship of Watson, 317 So.2d 30, 32 (Miss. Sup. Ct. 1975). Instead, the court below devised a result-dictated definition of domicile solely to uphold the adoption of G.B. and B.B. The state court sanctioned State exercise of jurisdiction simply because tribal members who were resident and domiciled on the reservation crossed the reservation border, relinquished custody to a non-Indian couple and asked the State court to exercise jurisdiction. No alternatives that would keep the children within the tribal community were even considered. In its willingness to distort legal doctrine to achieve its desired end, the Mississippi Supreme Court followed in the footsteps of those courts that Congressman Udall characterized as "shar[ing] a large

part of the responsibility for this crisis."[5] 124 Cong. Rec. H12850 (Oct. 14, 1978). See pp. 28-29, supra.

The holding below thwarts the goals of ICWA, namely, (1) the recognition of the essential decision-making role of tribes through the exercise of exclusive jurisdiction over child custody proceedings involving reservation children, and (2) the maintenance of children within their extended family and culture whenever possible.

As discussed at pp. 41-43, supra, the tribal role in ICWA is central. The lower court decision, by permitting subversion

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[5] The implication of the decision below that the ICWA does not apply because the children are off of the reservation, Matter of B.B., supra, 511 So.2d at 921, is illustrative of the willingness of the Mississippi Supreme Court to ignore any aspect of ICWA that is not in accord with its own predisposition. See, e.g., 25 U.S.C. 1911(b) which clearly provides for transfer to the tribal court of cases involving Indian children resident and domiciled off the reservation.

of tribal jurisdiction on a case-by-case basis and at parental option, undermines fundamental rights which inhere in tribal sovereignty. See pp. 11-20, supra. See also, DeCoteau v. District County Court, 420 U.S. 425, 465 n.8 (1975) (Douglas, J., dissenting) (the question of a child's welfare "involves a problem of domestic relations which goes to the heart of tribal self-government"). It elevates the choice of a parent who has decided to permanently terminate the parental relationship with the child over the social and compelling governmental parens patriae interest of tribes in maintaining a relationship with the child. See Senate Report, supra, at 51. The untenability of such a rule is apparent especially when, as here, parents continue to enjoy the rights and benefits of tribal membership and residence but are accorded unfettered license to deny those rights and benefits

to their children.

In addition, as discussed supra, pp. 31-39, Congress was very concerned about maintaining the child's relationship with the extended family and tribe. See Matter of Appeal in Pima County, supra, 635 P.2d at 189; 25 U.S.C. 1902; 25 U.S.C. 1915(a), (b). In most Indian cultures (including the Choctaw), the child's relationships with extended family and tribe are neither subordinate to nor less important than the biological parent/child relationship and, in fact, under tribal law and custom, extended family members often have specific child-rearing responsibilities and duties. See pp. 36-41, supra. To entirely defer to the jurisdictional preference of the parent relinquishing parental rights, as suggested by the Mississippi Supreme Court, would give that parent a power that he or she would not ordinarily have in

most Indian societies -- namely, the power to permanently sever the child's relationship with extended family, clan and tribe. To do so makes primary the personal needs of a relinquishing parent at the expense of the best interests of the Indian child as determined by Congress. See pp. 29-39, supra.

The intent of Congress is realized, however, if 25 U.S.C. 1911(a), is properly applied. Section 1911(a) was directly based upon preexisting case law. According to the House Report, supra, at 21, Section 1911(a) was intended to "confirm" the jurisdictional holdings of Wisconsin Potowatomies etc. v. Houston, supra, Wakefield v. Little Light, supra, and Matter of the Adoption of Buehl (also known as Duckhead v. Anderson), supra. In each of these cases, the court had found that the child's domicile was that of his or her parents. See pp. 20-23, supra.

Thus, in enacting 25 U.S.C. 1911(a), Congress intended to ensure that the children of tribal members resident or domiciled within the tribal community would be subject to tribal law and not state law. See Matter of Adoption of Halloway, 732 P.2d 962, 968 (Utah 1986) (off-reservation abandonment of child by reservation-domiciled Indian mother for the purpose of shifting child's domicile in order to facilitate state court adoption by non-Indians "conflicts with and undermines the operative scheme established by subsections 101(a) [25 U.S.C. 1911(a)] and 103(a) [25 U.S.C. 1913(a)] to deal with children of domiciliaries of the reservation...." Emphasis added). This construction most advances the basic assumption of the Indian Child Welfare Act that it is generally in the best interests of Indian children to protect their relationship

with the tribe and extended family. It ensures that children born to tribal members who are part of a tribal community will only be separated from that community when the tribe, as parens patriae, determines that such a separation is in the best interests of the child. As this court recognized in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians". Accord, Iowa Mutual Ins. Co. v. LaPlante,__ U.S.__,107 S.Ct. 971(1987).

In circumstances similar to those here, the New Mexico Court of Appeals and the Utah Supreme Court found that state courts lacked jurisdiction over the adoption of Indian children.

In Matter of Adoption of Baby

Child, 102 N.M. 735, 700 P.2d 198 (N.M. App. 1985), the mother of an illegitimate Pueblo child attempted to place her child for adoption off the reservation. The New Mexico Court of Appeals ruled that, because of the mother's reservation domicile, state courts had no subject matter jurisdiction over the adoption.[6]

In Matter of Adoption of Halloway, supra, a Navajo child was placed off the reservation in a non-Indian household. The child's mother was resident and domiciled on the reservation. The Utah Supreme Court held that state courts could not exercise jurisdiction over the child since he had been "removed from the

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6 This Court postponed probable jurisdiction over an earlier appeal in this case that raised the identical jurisdiction issue decided in Matter of Adoption of Baby Child, supra, but dismissed the appeal following the decision in Matter of Adoption of Baby Child. Pino v. District Court, etc., prob. juris. post., 471 U.S. 1014, app. dism., 472 U.S. 1001 (1985).

reservation and placed for adoption with non-Indians with the clear intent of circumventing the right granted the tribe by the ICWA to exclusive control over [the child's] custody." 732 P.2d. at 968. The parties had filed in state court in an attempt to find a court that might be "more receptive than a tribal court to ...[the child's] placement with non-Indian parents. Yet this receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed." Id. at 969.

The Utah Supreme Court concluded that although "questions of domicile [under ICWA] were left to be decided under state law....because Congress saw no apparent conflict between state domicile law and the purposes of the ICWA," state domicile law cannot be used to affirm state court jurisdiction "where state law...subtleties bring it into

conflict with the ICWA in ways that Congress apparently did not foresee."[7] Id. at 967.

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[7] As discussed in Halloway, the "Guidelines for State Courts; Indian Child Custody Proceedings" issued by the Bureau of Indian Affairs indicate that State domicile law may be applied in interpreting the ICWA because "[t]here is no indication that these state law definitions tend to undermine in any way the purposes of the Act." 44 Fed. Reg. 67583, 67585 (1979). As recognized in Halloway, however, where State domicile law "undermines" ICWA, its application is inappropriate.

Moreover, the Guidelines are not binding upon State courts. Id. at 67584. A forceful argument can be made that tribal domicile law and custom, and not state domicile law, should be dispositive in determining whether B.B. and G.B. are "domiciled within the [Mississippi Choctaw] reservation." 25 U.S.C. 1911(a). Deference to tribal law is an integral part of the ICWA. See 25 U.S.C. 1915 (d) (foster care and adoptive preference requirements determined by utilizing the prevailing social and cultural standards of the Indian community); 25 U.S.C. 1915(c) (authorizing tribes to set their own placement preferences); 25 U.S.C. 1903(2) ("extended family member" defined in the first instance by tribal law and custom); 25 U.S.C. 1903(6) (same in case of definition of "Indian custodian"); 25 U.S.C. 1903(12) (tribal courts include courts operated under tribal "code or -continued-

This Court has always held that Indian statutes are to be construed liberally for the benefit of Indian people and tribes. Ambiguous language is to be construed in favor of the Indians. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). It is vital that this Court apply the Indian Child Welfare Act to achieve its remedial and salutary purposes. It can do so only by holding that ICWA and preexisting case law require that tribes have exclusive jurisdiction over the children of tribal members who are resident or domiciled on the reservation. As a matter of federal law,

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7 -continued-

custom"); 25 U.S.C. 1911(d) (State courts required to give full faith and credit to the "public acts, records and judicial proceedings of any Indian tribe...."). In other contexts, this Court has recognized tribal court responsibility to address questions concerning the interaction between tribal and federal law. See Santa Clara Pueblo v. Martinez, supra 436 U.S. at 65-66.

this holding should be based on the premise that an Indian child's domicile remains that of his or her reservation-domiciled parents until entry of a tribal court order that results in an unambiguous alteration of the child's reservation domicile.[8]

If the decision below is not reversed, the potential deleterious impact on all tribes would be enormous. Such a result would create a huge loophole in the coverage of the ICWA. Many thousands of Indian children of reservation domiciled parents are born off of the reservation. Therefore, the Mississippi version of the law of domicile, if sanctioned by this Court, would likely

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8 An Indian child's reservation domicile may be changed whenever a tribal court with exclusive jurisdiction enters an order terminating the parent-child relationship and the child is subsequently placed off-reservation in the absence of any continuing tribal court wardship. 25 U.S.C. 1911(a)

subject a large number of children who are part of the tribal community to state court jurisdiction contrary to the intent of the ICWA.

Moreover, in view of the great demand for adoptable babies in 1988 society, see, e.g., Matter of Baby M, 109 N.J. 396, 537 A.2d 1227, 1249 (1988) (shortage of adoptable babies gives rise to surrogate parenting arrangements), the creation of an "option" to pursue the adoption of such children in state courts will likely lead to increased pressures on young Indian parents to consent to the adoption of their children outside of the tribal community.[9] As Congress noted in enacting the ICWA, one of the factors leading to

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9 The House Report noted that many "voluntary" consents are not truly voluntary. House Report, supra, at 11. See also In the Matter of an Adoption of an Indian Child, __ N.J. __, __ A.2d __ (slip. op. at 16) (N.J. Supreme Court, July 7, 1988). Parents, especially young or indigent parents, may relinquish rights -continued-

the high placement rates of Indian children was that "...agencies established to place children have an incentive to find children to place." House Report, supra, at 11.

Reversal of the judgment below and a correct application of 25 U.S.C. 1911(a) is imperative if the best interests of Indian children, as defined by Congress (25 U.S.C. 1902, 1915), are to be assured and the national commitment to and guarantee of tribal integrity and survival is to have any meaning. See 25 U.S.C. 1901(2),(3), 1902.

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9 -continued-
to a child because of pressure, a sense of inadequacy as a parent, or because of insurmountable obstacles to an adequate family life perceived by the parent. Short-term parental inability to care for a child may cause long-term harm to the tribe and the child. As Congress recognized, tribal control over the placement (if necessary) of the child, especially where the parents are resident and domiciled on the reservation, is an essential protection against the coercion of Indian parents and improvident actions by such parents that are contrary to the child's best interests.

CONCLUSION

For all of these reasons, the Indian Child Welfare Act should be construed, together with preexisting case law, to affirm the exclusive jurisdiction of the Mississippi Band of Choctaw Indians to determine the best interests of B.B. and G.B. The Choctaw tribal court and other tribal courts are best able to weigh all of the necessary factors to determine the best interests of Indian children. This Court must apply the ICWA and preexisting case law to recognize tribal authority to regulate the domestic affairs of all tribal members who are part of the tribal community, including tribal authority to determine the custody of the children of those members. The Mississippi Supreme Court decision should be reversed.

Respectfully submitted,

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